

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

WALT COX,

Appellant,

v.

OLYMPIC AIR POLLUTION CONTROL
AUTHORITY,

Respondent.

PCHE No. 89-57

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER (Revised)

Walt Cox appealed the Olympic Air Pollution Control Authority's ("OAPCA") issuance of a Notice of Civil Penalty Assessment (\$100) for alleged violation on June 16, 1988 of OAPCA Regulation I, Section 9.01 for burning prohibited material. The Pollution Control Hearings Board ("Board") held a hearing on November 1, 1989. Present for the Board were Members Judith A. Bendor, Presiding, and Harold S. Zimmerman. Attorney G. Saxon Rodgers of Ditlevson, Rodgers & Hanbey, P.S., (Olympia) represented appellant Cox. Attorney Fred Gentry of Bean, Gentry and Rathbone (Olympia) represented respondent OAPCA. Court reporter Bibi Carter with Gene Barker and Associates recorded the

1 proceedings. Witnesses were sworn and testified. Exhibits were
2 admitted and examined. Argument was made. From the foregoing, the
3 Board issued Final Findings of Fact, Conclusions of Law and Order
4 issued on December 5, 1989, affirming the penalty.

5 On December 12, 1989 appellant Cox filed a Petition for
6 Reconsideration. On December 19, 1989 appellant filed a transcript
7 excerpt of the testimony of witness Shawn Redmond. On December 20,
8 1989 OAPCA filed a Response. Having reviewed the record and the
9 filings on Reconsideration, the Board issues these revised:

10 FINDINGS OF FACT

11 I

12 Walt Cox owns Walt Cox Construction Company ("Cox") and was and
13 is the developer of Emerald Hills, a residential development in Lacey,
14 Washington.

15 The Olympic Air Pollution Control Authority ("OAPCA") has
16 authority to conduct an air pollution prevention and control program
17 in an area which includes the City of Lacey. The Pollution Control
18 Hearings Board ("PCHB") recognizes OAPCA's Regulation I, Section 9.01
19 which deals with open fires.

20 II

21 On June 16, 1988, Lacey Fire District No. 3 responded to a fire
22 at Emerald Hills, in an area known as "former lot 29." There was a 15
23 foot by 15 foot hot fire in a pit. Around the fire, scorched and
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27 FINAL FINDINGS OF FACT,
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1 burned were carpet material, plastics, and asphalt shingle scraps. We
2 find that the carpet material, plastics and asphalt had been burned.
3 Several individuals were nearby in a pickup truck. Former lot 29 was
4 vacant, and had been cleared of any vegetation and brush.

5 III

6 Cox had received plat approval for Emerald Hills in December
7 1987. At the time of the fire the company had built 20 homes at
8 Emerald Hills, of the total 82 it was to eventually build there. Only
9 3 homes were to be built by others out of the 85 total homes. On June
10 16, 1988, the Company was building within 500 feet of the fire.
11 On one lot adjacent to the fire someone else was building a house. In
12 June 1988, Cox employees or subcontractors came and went on former lot
13 29. From his perspective, Cox considered Emerald Hills to be one
14 piece of property. Cox did not stop anyone from going on any lot
15 within Emerald Hills.

16 During the hearing the parties stipulated that the City of Lacey
17 legally owned former lot 29 on June 16, 1988. The legal ownership is
18 still being contested in court. However, in September 1988 after the
19 incident, Cox applied for a fire permit to burn on former lot 29. In
20 October 1988, Cox again applied for a fire permit to burn on that
21 lot. In both instances the fire department went out and inspected the
22 site with Mr. Cox. The October inspection revealed that there was
23 plastic in the pile that was to be burned, and the fire inspector
24 requested that it be removed prior to burning.

1 Cox conceded that he would not have been "comfortable" applying
2 for a fire permit for someone else's property or walking on such site
3 with the fire department. The fire department witness stated that
4 during the fire permit application process Cox said he owned the lot.
5 Mr. Cox testified that he did not say specifically that he was the
6 owner.

7 We find, after observing the witness's demeanor, hearing all the
8 testimony, and examining the exhibits, that Cox conducted his affairs on
9 June 16, 1988 as if he owned the property, exercising control over
10 it. We further find, using reasonable inferences, that it is more
11 probable than not that Cox allowed the burning of prohibited material
12 to occur on June 16, 1988 on former lot 29.

13 IV

14 On March 30, 1989, OAPCA issued Notice of Civil Penalty
15 Assessment (\$100) to Walt Cox for alleged violation of Regulation I,
16 Section 9.01 for burning unlawful material. This Notice was served on
17 Walt Cox on April 25, 1989. The appeal was filed on May 2, 1989,
18 which became our PCHB No. 89-57.

19 V

20 On September 5, 1989, OAPCA filed a Motion to Dismiss contending
21 the appeal did not conform with Chapt. 371-08 WAC. In response
22 appellant filed an Amended Notice of Appeal (September 15, 1989).
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27 FINAL FINDINGS OF FACT,
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VI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board makes the following revised:

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the parties and the subject of this appeal. Chaps. 43.21B and 70.94 RCW.

II

We conclude that Motion to Dismiss should be denied. The Amended Notice of Appeal, filed six weeks before the hearing, satisfied Chapt. 371-08 WAC. The primary function of pleadings in administrative appeals is to serve the function of notice. See, Marysville v. Puget Sound Air Pollution Control Agency, 104 Wn.2d 115, 702 P.2d (1985); Council for Land Care and Planning, et al. v. Spokane County Air Pollution Control Authority, et al., PCHB No. 88-23 (Order Denying Summary Judgment, January 12, 1989). The notice function was served and no prejudice has been claimed.

III

OAPCA Regulation I at Section 9.01 states in pertinent part:

(a) No person shall cause or allow any open fire within the jurisdiction of the Authority except as follows:
[. . .]

1 (4) Any fire allowed under this section is
2 subject to the following:

3 [. . .]

4 (iv) No material containing asphalt,
5 petroleum products, paints, rubber products,
6 plastic or any substance which normally
7 emits dense smoke or obnoxious odors will be
8 burned.

9 We conclude that prohibited materials had been burned in this
10 open fire in violation of Section 9.01, Regulation I.

11 IV

12 In this penalty action, the air pollution authority has to
13 demonstrate that the Cox Company was liable, that as a matter of law
14 the company "caused or allowed" the prohibited materials to be
15 burned. Section 9.01(a).

16 A contractor is responsible for the acts of its employees and
17 subcontractors. Ken Pearson Construction, Inc. v. PSAPCA, PCHB No.
18 88-186. We conclude as a matter of law, given all the facts, that it
19 is more probable than not that appellant Cox did allow the burning of
20 prohibited material to occur, violating Section 9.01(a). See,
21 Cummings v. DOE, PCHB No. 85-89. Cox's construction activities in
22 Emerald Hills far exceeded the few houses built by others. His
23 employees or subcontractors were working in the vicinity of the fire
24 on the day in question. His conduct, despite the technical status of
25 Lacey's legal ownership, was that of someone who controlled the

1 property. After the incident, as late as October 1989, he sought to
2 burn on that same former lot 29.

3 VI

4 One of the principal aims of a civil penalty is to secure future
5 compliance. The maximum statutory penalty is \$1,000. Only \$100 was
6 assessed. We conclude that the penalty was appropriate.

7 VI

8 Any Finding of Fact which is deemed a Conclusion of Law is hereby
9 adopted as such. From Conclusions of Law, the Board enters this:
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ORDER

The Petition for Reconsideration is Granted in so far as the Findings and Conclusions are Revised.

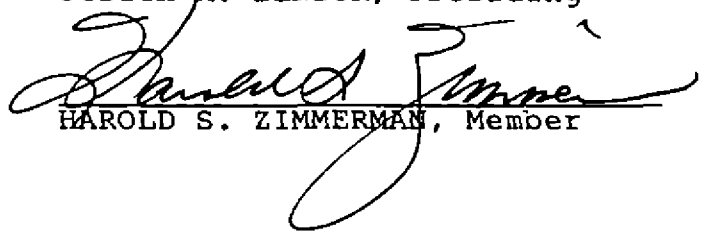
The Petition is Denied in so far as Reversal is requested.

OAPCA's Notice of Civil Penalty Assessment (\$100) issued to Walt Cox is RE-AFFIRMED.

DONE this 20th day of December, 1989.

POLLUTION CONTROL HEARINGS BOARD


JUDITH A. BENDOR, Presiding


HAROLD S. ZIMMERMAN, Member

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3 following:

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7 Emerald Hills, a residential development in Lacey, Washington.

8 Olympic Air Pollution Control Authority ("OAPCA") has authority
9 to conduct an air pollution prevention and control program in an area
10 which includes the City of Lacey. The Pollution Control Hearings
11 Board ("PCHB") recognizes OAPCA's Regulation I, Article 9.

12 II

13 On June 16, 1989, Lacey Fire District No. 3 responded to a fire
14 at Emerald Hills, in an area known as "former lot 29." There was a 15
15 foot by 15 foot hot fire in a pit. In the fire or smoking as the
16 result of the fire were carpet material, plastics, and asphalt shingle
17 scraps. Several individuals were nearby in a pickup truck.

18 Former lot 29 was vacant, and had been cleared of any vegetation
19 and brush.

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22 1988. At the time of the fire the company had built 20 homes at
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1 were to be built by others, for a total of 85 homes. On June 16,
2 1989, the Company was building within 500 feet of the fire.
3 On one lot adjacent to the fire someone else was building a house. In
4 June 1988, Cox employees or subcontractors came and went on former lot
5 29. From his perspective, Cox considered Emerald Hills to be one
6 piece of property. Cox did not stop anyone from going on any lot
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13 the fire department went out and inspected the site with Mr. Cox. Cox
14 conceded that he would not have been "comfortable" applying for a fire
15 permit for someone else's property and walking on that site with the
16 fire department. The fire department witness stated that during the
17 application process Cox said he owned the lot. Mr. Cox testified that
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21 Assessment (\$100) to Walt Cox for alleged violation of Regulation I,
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(4) Any fire allowed under this section is subject to the following:

[. . .]

(iv) No material containing asphalt, petroleum products, paints, rubber products, plastic or any substance which normally emits dense smoke or obnoxious odors will be burned.

IV

Appellant does not contest that prohibited materials were burned.

Appellant does dispute any legal liability for the fire.

V

In this penalty action, the air pollution authority has the burden to prove that the Cox Company "caused or allowed" the prohibited materials to be burned. Section 9.01(a)(4)(iv). The standard of proof is "more probable than not." A contractor is responsible for the acts of its subcontractors. Ken Pearson Construction, Inc. v. PSAPCA, PCHB No. 88-186. The Authority need not prove which of these two entities actually set the fire in order for it to have sustained its burden of proof.

We conclude under all the facts that it is more probable than not that appellant Cox did cause or allow the burning to occur. Cox

1 conducted his affairs, even after June 16, 1989, as if he had control
2 over former lot 29. The technical status of Lacey's legal ownership
3 did not prevent him as late as October 1989 from seeking to burn on
4 that property. Moreover, Cox's construction activities in Emerald
5 Hills far exceeded the few houses built by others, and his employees
6 or subcontractors were working in that general area on the day in
7 question.

8 VI

9 One of the principal aims of a civil penalty is to secure future
10 compliance. The maximum statutory penalty is \$1,000. Only \$100 was
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12 VI


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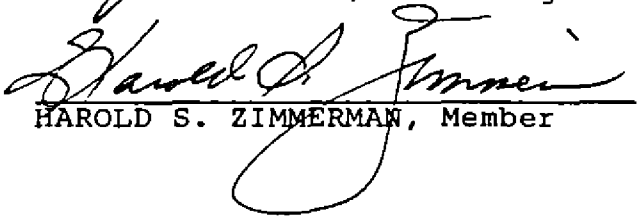
ORDER

OAPCA's Notice of Civil Penalty Assessment (\$100) issued to Walt Cox is AFFIRMED.

DONE this 5th day of December, 1989.

POLLUTION CONTROL HEARINGS BOARD


JUDITH A. BENDOR, Presiding


HAROLD S. ZIMMERMAN, Member

FINAL FINDINGS OF FACT,
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